

Sentencing Act 2002 and Sentencing Amendment Act 2014

The Sentencing Amendment Act 2014 was passed into law on 6 June 2014 and becomes effective on 6 December 2014.

Legal Scenario

Under the Sentencing Act 2002, when sentencing offenders convicted of criminal offences, a court may impose a sentence of reparation to the victim(s) of the crime. The reparation may be in respect of:

1. *loss of or damage to property and/or*
2. *emotional harm and/or*
3. *loss or damage consequential on any emotional or physical harm.*

Whilst 3. commonly comprises personal injury, the current Sentencing Act 2002 imposes a significant limitation on courts in respect of this heading of reparation because where the victim is entitled to benefits under the Accident Compensation Act there can be no element of personal injury compensation included in any reparation awarded. This is consistent with the wider principle of ACC which removes the right to sue for compensation for personal injury in NZ, in return for universal “no fault” entitlement to prescribed compensation.

This principle was tested in a case, *Police v Davies* in 2006 where Davies was convicted of careless driving causing injury. In awarding reparation to the victim the District Court interpreted the Sentencing Act as permitting reparation to include a compensation for personal injury over and above ACC benefits - (“top-up”). Davies appealed this award through to the Supreme Court where a majority decision held that if loss or damage was believed to give rise to ACC entitlements, no reparation order might be made in respect of that loss. The reparation awarded against the Police was reduced by the amount of the “top up” element. (*SC 83/207 [2009] NZSC 47*).

Legislators were obviously persuaded that the Supreme Court ruling was unacceptable and we now have the Sentencing Amendment Act 2014 which overturns the Supreme Court decision. The significant amendment is to Sect. 32: The 2002 Act in Sect 32 (5) said;

the court must not order the making of a reparation in respect of any consequential loss or damage described in subsection (1)(c) for which the court believes the victim has entitlements under the Accident Compensation Act 2001

The Amendment Act (2014) replaces this sub-section with:

the court must not order the making of a reparation in respect of any consequential loss or damage described in subsection (1)(c) for which compensation has been, or is to be, paid under the Accident Compensation Act 2001

The niceties of “entitlement” versus “paid” are well expounded in the Supreme Court decision. The amended Act means that, in assessing the level of reparation for personal injury which the court may award to the victim, the courts can include a sum for compensation for personal injury over and above what is paid under ACC. In other words the ACC benefits paid or payable to the injured victim will become a quasi “excess” applicable to the court’s assessment of the level of compensation for personal injury due to the victim.

Of no comfort to insurers however there is a provision in Sect 35 of the Act which allows courts, when assessing the level of fine and/or reparation, to take account of the offender’s financial capacity to pay. So the question of insurance will always come into play and it will be practically impossible to conceal its existence.

In defying the principles of the NZ “no fault/level playing field” accident compensation regime the Amendment Act has created a threefold anomaly in that:

- reparation including compensation for personal injury additional to ACC can be sought and gained; but
- only to those who suffer at the hand of a convicted offender; and
- only where the offender can afford to pay

The Insurance Council is of the view that the Government has made a clear policy choice to prioritise the interests of victims of crime and acknowledges the double standard that has now been created between the victims of crime and the victims of negligence.

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The effect of this new legislation will be widespread throughout the insurance industry.

The legislation creates an exception to the principle of ACC being the only avenue for compensation for personal injury by accident - but only for the victims of convicted offenders. They may receive reparation which includes compensation in excess of ACC payments when the Act becomes effective after 6 December 2014.

Just for example:

- Because of ACC's 80% cap on weekly compensation, 20% of a victim's loss of income is not covered. Further, the maximum that ACC can pay under its Act is currently \$1,818 per week. With the courts being able to address these shortfalls in ACC compensation because of the new sentencing rules, victims of convicted offenders will be advantaged (especially high earning and wealthy victims) by potentially open-ended compensation (reparation) for personal injury.
- At present overseas visitors are entitled only to ACC lump sum benefits (unless they are in employment). If insured's or their employees are convicted of any offence which gives rise to personal injury there is scope for courts to award reparation including loss in excess of ACC benefits.

For liability insurers the main impact is likely to be on claims costs under Statutory Liability policies for prosecutions under the Health & Safety in Employment Act. Successful prosecutions under this Act result in criminal convictions which in turn means sentencing is subject to this Amendment Act.

- This legislation will be replaced when the Health & Safety Reform Bill is passed into law. (See [VL Market Bulletin May 2014](#)).
- The progress of this Reform Bill is on schedule for enactment on 1 April 2015.
- The re-enactment of this legislation will most likely increase the number of prosecutions with more severe fines and higher reparation awards.
- Worksafe inspectors are currently adopting a more rigorous approach in prosecutions in anticipation of the reform legislation.

- Where Worksafe chooses not to prosecute, private prosecutions can result, with trade unions taking up employment injury cases on behalf of injured workers.

The new Sentencing Act provisions will inevitably increase the cost of these claims in what is effectively a triple jeopardy for insurers, ie:

- More rigorous Worksafe regime
- New Health & Safety legislation
- New sentencing Act provisions

The Liability market also has potential exposures under Public Liability policies for reparation awards arising from various negligence based criminal convictions which may attract indemnity and defence costs under:

- Service & Repair extensions - driving customers' vehicles/boats and
- Valet Parking extensions
- Unregistered vehicles - farm vehicles - quad bikes - contractors' plant
- Motor Sport
- Adventure Tourism
- Sporting events
- Aviation

Are your clients' current policy limits still adequate?

VL is committed to assisting New Zealand businesses facing the challenges presented by these legislative changes

Beyond the Liability sector insurers who provide indemnity for compensation in third party personal injury claims under various policies will be affected to varying degrees.

Please contact your specialist [VL Underwriter](#) to discuss any aspect of this Bulletin or you may care to view additional commentary from law firms [Chapman Tripp](#), [DLA Phillips Fox](#), [Fortune Manning](#) or [Minter Ellison](#).

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